UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SUNSHINE PIPING, INC.

and **CASE 15-CA-16781**

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE U.S. & CANADA, AFL-CIO, LOCAL NUMBER 366

Charles R. Rogers, Esq., Stephen C. Bensinger, Esq., and ***Kathleen McKinney, Esq.,*** for the General Counsel.
Tony B. Griffin, Esq., for Respondent.
Curt Tharpe, State Organizer, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. A hearing in the above-captioned case was held on April 28, 29, and 30, 2003, and I issued the Decision in this matter on June 30, 2003. In my Decision, I found that Respondent issued work performance disciplinary warnings to Robert Huggins, herein Huggins, in violation of Section 8(a)(1), (3), and (4) of the Act. I did not find however, that Respondent violated the Act by disciplining and ultimately terminating Huggins under the attendance policy implemented on May 6, 2002. I found no evidence that Huggins was treated any differently than any other employee who violated the attendance policy. Specifically, I found that Respondent demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.

By a motion dated February 27, 2004, Counsel for the General Counsel requested the Board to reopen the record in this case and to allow the submission of newly discovered evidence that was not previously available to the General Counsel at the time of the initial hearing in this matter. In support of its motion, Counsel for the General Counsel submitted that the newly discovered evidence was contained in a witness' deposition given nearly five months after my June 30, 2003 decision. General Counsel requested the Board to remand the case to me for an in camera inspection of the deposition to determine whether General

Counsel's motion should be granted. General Counsel also requested a reopening of the hearing to receive additional testimony from the witness and other appropriate evidence relating to the issues raised by the witness' deposition. In his motion, Counsel for the General Counsel submits that the witness provided evidence that Respondent's owner, Jim Scott, altered the attendance records of several employees prior to the April 2003 hearing. Counsel for the General Counsel alleges the evidence would show that Scott altered, destroyed, and created new attendance records to hide disparity in the administration of the attendance policy and to make it appear that other employees received discipline consistent with that given to Huggins.

On March 18, 2004, Respondent filed its Opposition to Counsel for the General Counsel's Motion to Reopen the Record. In support of its opposition, Respondent submitted a number of arguments. Specifically, Respondent argued that General Counsel's motion must be denied because: (1) the motion is premature because the Board has not yet issued its decision; (2) the motion was not filed promptly upon discovery of the evidence at issue; and (3) General Counsel has not met its burden of establishing that it has met the requirements of Section 102.48(d)(1) of the Board's Rules and Regulations for reopening the record on the basis of "newly discovered evidence." In arguing that General Counsel has failed to meet its burden under the Board's Rules and Regulations, Respondent asserts that General Counsel has failed to meet its burden of establishing that it was excusably ignorant of the evidence and that it acted with reasonable diligence in attempting to uncover and introduce the evidence. Respondent maintains that General Counsel has also failed to meet its burden of establishing that the alleged evidence would require a different result than that reached by the judge. Finally, in its opposition, Respondent argues that "General Counsel be required to show cause why the motion should not be denied, given the extraordinary and highly unusual procedures followed in obtaining the alleged evidence in issue." Respondent asserts that General Counsel's actions are a denial of its due process rights and the ex parte deposition is in violation of the Board's own Rules and Regulations.

On May 27, 2004, the Board issued an Order referring General Counsel's Motion and the issues of fact and law raised by the Motion and Respondent's Opposition to me for decision. Counsels for the General Counsel were directed to provide me with the deposition for an in camera review. Following an in camera inspection, the Board directed the Motion be denied through the issuance of a supplemental decision or the hearing be reopened to further explore the issues raised by the Motion and Opposition through record testimony. Additionally, the Board conditionally remanded the case to allow receipt of additional evidence and testimony on the unfair labor practice matters and to provide for the issuance of a supplemental decision, if appropriate and necessary. On July 8, I issued an Order reopening the record and setting the matter to be heard on August 10, 2004. On August 4, 2004 Respondent filed a motion to dismiss reopening of the record and on August 5, 2004, I issued a Second Order finding no basis upon which to rescind the earlier Order reopening the record.

Pursuant to the Board's May 27, 2004 Order and within the parameters of the Order, a hearing on these matters was conducted before me in Panama City, Florida on August 10 and 11 and on October 12, 13, 14, and 15, 2004. All parties were represented and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. Upon reevaluation of the entire record, including the evidence received pursuant to the Board's Order, and including my observation of the demeanor of the

witnesses, and after considering the briefs filed by the General Counsel and Respondent, I hereby make the following:

Findings of Fact

I. Issues

The primary issue in this reopened case involves whether Respondent altered, created, or destroyed documents in anticipation of a Board hearing and in response to charges filed by the Union. If the record supports that such action was taken by Respondent, a corollary issue is whether my original decision must be modified. Over the course of the hearing, other issues arose with respect to whether General Counsel could amend the complaint to allege an additional 8(a) (1) violation based upon the Board's holding in Johnny's Poultry[1] as well as to amend the complaint to request reimbursement of litigation expenses incurred by the General Counsel. General Counsel also seeks to strike the testimony of Union Representative Jay Cowick on the basis that he testified in violation of the sequestration order. Additionally, Counsel for the General Counsel seeks to strike all or a portion of the testimony for 15 of Respondent's witnesses based upon inadmissibility of the testimony under Rule 608(b) of the Federal Rules of Evidence. Respondent also raises the issue of whether General Counsel has moved to reopen the record in denial of Respondent's due process rights and whether certain documents submitted by General Counsel should be stricken from the record.

II. General Counsel's Additional Evidence

A. Procedural Background

Counsels for the General Counsel called three witnesses in this reopened matter: Rodney Johnson; the Regional Director for Region 15 of the Board, Steven Phelps, and Cynthia Arledge. Regional Director Johnson, herein Johnson, testified concerning the procedural history that preceded General Counsel's Motion to Reopen the Record. Johnson testified that shortly before the issuance of my initial decision, the Region learned that a number of individuals had contacted the Union concerning testimony given in the April 2003 hearing. Learning that one of the individuals was a former supervisor, the Region consulted with the General Counsel's office in Washington concerning the ethical issue of speaking with a former supervisor. While waiting for a response from Washington, the Region attempted to reach a non-supervisory employee who had spoken with the Union. On July 17, 2003, the Region hand-delivered a subpoena ad testificandum to Cynthia Arledge, herein Arledge.[2] On July 23, 2003, the Region issued a subpoena ad testificandum to Arledge, requiring her presence at the U.S. District Court in Panama City, Florida on August 5, 2003. Sent by certified mail, the July 23, 2003 subpoena was received by Arledge. Johnson explained that the Region received neither testimonial nor documentary evidence in response to either of the subpoenas. Because Arledge indicated that she would invoke her Fifth Amendment rights, the Region contacted the U.S. Attorney's office on October 6, 2003, requesting limited immunity for Arledge from prosecution for perjury and for creating false documents. After obtaining the grant of immunity for Arledge on October 16, the Region

[1] 146 NLRB 770 (1964).

[2] Arledge testified as a witness for Respondent during the April 2003 hearing.

sought enforcement of its subpoena to Arledge. On November 14, 2003, United States District Judge Lacey A. Collier issued an Order, requiring that Arledge obey and fully comply with the Board's Subpoena A-670383. Judge Collier further ordered that Arledge appear for a deposition at a time and place to be set by the Board. Judge Collier also granted the Region's motion to file the application for enforcement of the subpoena under seal. Pursuant to the Court's Order, Arledge was notified by letter dated November 18, 2003, informing her of her requirement to appear for a deposition on November 25, 2003 at the U.S. District Court in Panama City, Florida. In the letter notifying Arledge of her requirement to appear for the deposition, Board Attorney Charles R. Rogers explained that because the Judge granted the motion to file subpoena enforcement documents "under seal," the enforcement of the subpoena "would not be made public." On November 25, 2003, Arledge appeared and provided sworn testimony through a deposition.

Having obtained the sworn testimony of Arledge, the Region submitted to Assistant General Counsel Jim Paulsen, a December 31, 2003 recommendation to file a motion to reopen and remand to the Board. On January 29, 2004, Associate General Counsel Barry J. Kearney notified Johnson that the Region was authorized to proceed as requested.

B. Arledge's Involvement with the Attendance Policy

Cynthia Arledge began working for Respondent in June 2000. Although she was a shipping clerk during the period between May 6, 2002 and October 1, 2002, Arledge reported directly to owner Jim Scott. She was responsible for completing the production reports as well as monitoring the new attendance policy that was implemented on May 6. When the new attendance policy was implemented on May 6, 2002, Scott divided the attendance policy into assessment periods and the first period ended on November 4, 2002. As part of her responsibility, Arledge reviewed the time cards each morning and afternoon for the metal and building trades' employees, as well as for the office employees. In reviewing the time cards, Arledge documented employees' absences and tardiness. She testified that initially she was allowed to excuse attendance infractions if the employees' provided adequate documentation. She explained that at a later period, Scott no longer wanted her to designate whether the infractions were excused or unexcused and she merely completed a cover sheet that included an explanation of the employee's absence or tardiness. Arledge was unable to identify with any specificity when her responsibilities changed on documenting attendance infractions.

While Arledge could not recall the specific date, she recalled however, that after some point, only Scott made the decisions as to whether an employee's absence or tardiness was excused or unexcused. She likened the process to a "buddy system." She explained that an employee received an excused or unexcused absence based upon whether Scott liked the employee. Arledge gave examples of specific employees who were treated differently even though their infractions and the reasons for their absences were similar.[3]

[3] General Counsel Exhibit No. 40 reflects that Mike Lawrence received a verbal warning for a time card discrepancy on July 1, 2002 and a written warning for a second time card discrepancy on July 9, 2002. While he also had a time card discrepancy on October 25, 2002, there is no evidence of any additional discipline administered to him.

Kevin Scott, Jim Scott's son, testified that he was also given responsibilities for the attendance policy from July 2002 until March 2003. Jim Scott testified that Kevin Scott's was responsible for taking care of the "simple things." Jim Scott explained that if there was appropriate documentation for an attendance infraction, Arledge could excuse the infraction. If the incident involved an unexcused first or second offense, Arledge took the matter to Kevin Scott. If the incident involved a suspension or termination, Arledge took the matter to Jim Scott for review and decision.

John Goldberg served as Respondent's Safety Director and Human Resources Director in 2002. Jim Scott, Kevin Scott, and Arledge all testified that at some point during late 2002, the responsibility for monitoring the attendance policy was transferred from Arledge to Goldberg. While Jim Scott testified that the transfer occurred between October 1 and mid-October, Kevin Scott testified that the transfer occurred between mid-October and late October. Arledge recalled that Goldberg took over her duties in about October or November 2002, while she and Scott were conducting a review of the attendance documents. Arledge testified that Goldberg did not become involved in the enforcement of the attendance policy until the Board's investigation and as she explained: "we were going to court."

Arledge recalled that at some point prior to the April 2003 trial, Scott told her that the two of them needed to review all of the employee attendance records. Arledge recalled telling Scott that the records were "fine" because she had taken care of them. Scott, however, explained to Arledge that the records needed to be reviewed because "they've got to be right." Arledge recalled that for at least two months, she sat in the office with Scott every day reviewing all of the attendance records. Arledge testified that not only were the files reviewed, they were also changed. Arledge explained that she and Scott reviewed each file in preparation for the trial.

Arledge described the process by which she and Scott reviewed each file:

> We would take that record and then we would flip them and go through them each, one by one. Mr. Scott was looking to see whether he liked that excuse, whether that was what's supposed to be on there, whether the record was up to par, and this is what we wanted it to say. And that's what I helped Mr. Scott do.

In reviewing the file for each employee, Scott used a form identified as "Report By Employee Name," which was a computer print-out of the hours scheduled, hours worked, as well as any instances of absence, tardiness, leaving early, or time card discrepancies for the employee for each work day. Employee time cards were also reviewed in relation to the employees' attendance record. Arledge explained that if Scott found a file that he didn't like because it was "not jiving," he "fixed" the file. She explained that because the time cards could not be changed,[4] the files were changed to correspond to the time cards.[5] Arledge

[4] While the record does not reflect any details as to how the time cards are maintained, the parties do not appear to dispute Arledge's assertion.

[5] Arledge recalled that there was one time card that they could not "work around." She recalled: "Steven Phelps had to take it and do something with it because we couldn't work around that time card. Those files had to go with that time card."

recalled specifically that Scott "fixed" Robert Huggins file as well as other employees' files. Arledge and Scott created new attendance records for a number of employees including Jim Jones, Harry Nelson, Darrell Scott, and an employee identified only as Lisa. Arledge recalled that when she and Scott reviewed Huggins' file, some of the "unexcused" absences were changed to "excused" to make it appear that Respondent was not really "riding down on him." Arledge recalled that as she and Scott went through each employee's file, documents were rewritten and re-signed by supervisors. Arledge testified that the records were completely "doctored up" to reflect what Scott "wanted them to say." After Scott marked the documents to be changed, Arledge input the computer changes.

Arledge asserted that she had believed that she was helping Scott with his case and she believed that the files were to be submitted to Scott's attorney. Arledge testified that she did not realize that the files were going to be submitted to the judge. Arledge testified that after she testified as a witness in this case in April 2003, she realized that the records that had been reviewed and changed were in the possession of the court and not just the attorney. She explained that prior to testifying, she had no idea that the records were going to appear in the courtroom. She added that she had worked previously for the state of Florida for nine years and she understood what it meant to submit false documentation to a federal judge or to any kind of government. After returning from the hearing, Arledge confronted Scott about submitting the altered records to the court. She also told Scott that she would report that altered records were given to the judge. She recalled that he simply looked at her without commenting. Following that conversation, she seldom saw Scott. She recalled: "I guess that he was through with me and he didn't want to hear any more out of me." Shortly after her confrontation with Scott, Arledge was moved from the office area to the blasting area. Because of the fumes from a large acid vat, she experienced difficulty breathing. She explained that after continuing problems with dizziness, weakness, and weight loss she was hospitalized. Arledge subsequently resigned and later filed a worker's compensation claim.[6]

Arledge recalled that after leaving Sunshine Piping, Supervisor Steven Phelps came to her house to see how she was doing. As Arledge discussed her sickness and her plans to file a worker's compensation claim, Phelps admitted that he should have done something when she was moved from the office to the blasting area. Phelps told her he knew what the two of them had done was wrong and he urged her to tell the truth about what happened. Phelps added: "See what happened to you" and suggested that she set the record straight. While at Arledge's home, Phelps telephoned Union Representative Gregg Boggs. Arledge also spoke briefly with Boggs and told him that she had not been honest and she needed to talk with him. It was shortly after her telephone conversation with Boggs that Board attorney Rogers began contacting her. Arledge explained however, that after talking with Boggs, she was afraid to give a statement to the Board. She did not provide a statement to the Board until she was required to participate in the deposition.

C. Phelps' Involvement in the Attendance Policy

Steven Phelps worked for Respondent for approximately nine to ten years. Phelps began as a pipefitter and progressed to the position of plant manager. At the time that he

[6] As of the time of the 2004 hearing, Arledge's worker's compensation claim had not been resolved and remained under appeal.

was laid off in June 2003, he had been plant manager since the beginning of 2002. Phelps testified that prior to the hearing concerning Huggins' discharge, he observed Arledge and Scott reviewing attendance records and personnel files. He recalled that during this same period, he was called into the office to sign or re-sign attendance forms. He specially recalled that he re-signed attendance records for Robert Huggins and for David Morton. He could not recall other employees' records specifically, however he estimated that he re-signed approximately a dozen or more attendance forms.

Phelps recalled giving Huggins an unexcused absence for an incident involving his son's head being caught in a piece of furniture. During the April 2003 hearing in this matter, Respondent submitted into evidence a copy of a July 2, 2002 disciplinary action form issuing a verbal warning to Huggins for tardiness. The comments section of the document includes the wording: "Employee called said 'son stuck in couch' 6:18 a.m. on 7-02-02." Phelps recalled that prior to Huggins' unexcused absence, employee John Frye was excused for an absence involving a similar experience with his son. Phelps recalled that prior to Huggins' termination, he brought the discrepancy to Scott's attention. Phelps testified that after his calling this discrepancy to Scott's attention, Frye's absence was changed to unexcused. During direct examination, Phelps was shown General Counsel Exhibit No. 15 that was purported to be attendance records for John Frye. The parties stipulated that this exhibit was composed of records provided pursuant to subpoena and for a period between May 5, 2002 and November 4, 2002. Phelps testified that the original disciplinary action reporting form concerning Frye's absence for his son's head being caught in the couch was not among Frye's attendance records.

Arledge recalled that another employee's absence also related to the employee's son's being stuck in a couch. Arledge recalled: "There was another gentleman who had - - his son was stuck in the couch. I believe that one got excused and one did not. And it was weird because two gentlemen called in with their sons stuck in a couch."

III. Respondent's Evidence

In response to General Counsel's newly submitted evidence, Respondent presented the testimony of 20 witnesses. As described more fully below, a number of these witnesses testified concerning Arledge's and Phelps' employment conduct that was totally unrelated to Respondent's enforcement of its attendance policy and unrelated to the allegations of Scott's alteration, creation, or destruction of attendance records. Solely in the interest of due process, and while noting the objections of Counsels for the General Counsel, Respondent was allowed a degree of latitude in presenting such testimony. I advised Respondent's counsel that such testimony was allowed only as it might relate to demonstrating motivation for Arledge and Phelps coming forward after the original trial in this matter. Such testimony was not allowed as a means of impeachment on collateral matters.

Specifically, Respondent presented Kirk Stanford, David Elmore, David Owens, Gary Elmore, and Alonzo Russ who testified that they observed Phelps using prescription drugs on Respondent's premises while employed with Respondent. Lisa Hedayati and David Elmore observed Phelps's giving or exchanging prescription drugs with other employees. Employees Kathy Bailey, Timothy Speakman, Brenda Foster, Alonzo Russ, and David Owens testified concerning incidents in which Phelps bought or attempted to buy prescription drugs from employees. Gerald Nelson testified that Phelps not only promoted him to a particular job in exchange for two prescriptions for Lortabs but Phelps also sold him a piece

of Respondent's equipment in exchange for 20 Lortabs. Employees Owens, Russ, Stanford, and Bailey also testified that Phelps sold prescription drugs. Bailey recalled that she and Phelps "did a line" of "crystal meth" in Respondent's machine shop during the regular workday. Employees Owens, Stanford, and supervisor Mildred Fay Burke testified that Phelps obtained drug-free urine from other employees in order to pass the mandatory drug screenings. In a further attempt to discredit Phelps, Respondent presented employees Russ and Speakman to testify that Phelps solicited and arranged for a female employee to engage in a strip tease at Respondent's facility during the regular workday. Respondent also presented witnesses who testified that Phelps confiscated tools from Respondent's facility and sold safety glasses to employees that he received as a promotional item from one of Respondent's vendors. As discussed later in this decision, Respondent also presented some brief testimony with respect to Arledge's involvement in the drug activity at Respondent's facility.

The record reflects that when the attendance policy was implemented in May 2002, all of the prior attendance infractions became void and employees began with a new slate. Progressive discipline was imposed based upon the number of attendance infractions within the initial six-month period. In rebuttal to the testimony of Arledge and Phelps, Scott testified concerning his review of the attendance files. Scott testified that during the first six months of the attendance policy tracking or assessment period,[7] he became aware of errors made by Arledge in her monitoring of the attendance policy. Scott also asserted that he noticed that Arledge was "favoring personnel." Scott testified that because of Arledge's errors, he reviewed the "whole system." Scott asserted that he not only became more involved in the attendance policy program, he eventually took the program away from Arledge and reassigned the duties during the latter part of the first tracking period. Scott testified that prior to removing the assignment from Arledge, he asked her to sit down with him to go over the files document by document. Scott testified that he could not recall the exact date that he and Arledge went over the files, however he believed that it had been approximately two months before the end of the first tracking period that began in May 2002. Scott asserted that he and Arledge reviewed the attendance records and the time cards for each employee and that records were changed to correct errors. Scott testified that disciplinary action forms were changed from "excused" to "unexcused" or vice versa were as a result of his 2002 audit with Arledge. He explained that when he found attendance records that required correcting, he marked the alterations in red and gave them to Arledge who entered the new information into Respondent's computer database. After changes were made in the attendance records, Arledge created a new database printout. He assumed that the old printout was then destroyed or thrown away.

IV. Analysis and Conclusions

A. Whether General Counsel Violated Respondent's Procedural Due Process Rights

In its brief, Respondent argues that Region 15 acted under a shroud of secrecy during this proceeding. Respondent argues not only that the Counsel for the General Counsel failed to timely inform the administrative law judge of the information obtained from the Union regarding the secret witness, but also failed to timely inform the Board of the

[7] The record reflects that the first six months of the attendance policy was the initial tracking period for evaluating attendance policy infractions.

"newly-discovered information." Respondent contends that General Counsel subpoenaed the witness ex-parte and filed a motion with the court ex-parte and under seal. Respondent asserts that by using this secret evidence to seek a re-opening of this case, General Counsel violated Respondent's due process rights.

Citing *Soule Glass and Glazing Company v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), Respondent asserts that it was entitled to procedural due process in this re-opened proceeding. In its decision in *Soule Glass and Glazing Company*, the First Circuit Court of Appeals stated: "Due process requires that persons charged with unlawful conduct be given prior notice of the charges and an opportunity to be heard in defense before the government can take enforcement action." The court also explained "Due process prohibits the enforcement of a finding by the Board of a violation neither charged in the complaint nor litigated at the hearing." *Ibid* at 1074. I note however, that the Court also acknowledged that the courts have recognized the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that the issue was not specifically pleaded. The court explained that the applicable test is "one of fairness under the circumstances of each case" and "whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." *Ibid* at 1074. In further support of its argument, Respondent cites an administrative law judge's decision that references the court's holding in *Soule Glass and Glazing Company*.

As Counsel for the General Counsel points out in his brief, a party may move to reopen the record on the basis of "newly discovered evidence" under Section 102.48(d)(l). To satisfy the requirements of this section the moving party must show that (1) the evidence existed at the time of the hearing, (2) the movant is excusably ignorant of the evidence, (3) the movant acted with reasonably diligence in uncovering had introducing the evidence, and (4) the evidence would require a different result than that reached by the judge. Counsel for the General Counsel argues that General Counsel has proven each of these factors and I concur.

There is no dispute that if Respondent altered its attendance policy records, it did so prior to the April 2003 hearing. Clearly, such alleged altered records existed at the time of the original hearing in this matter, meeting the first criteria for General Counsel's motion to reopen.

In its March 18, 2004 opposition to General Counsel's motion to reopen the record, Respondent's counsel argues "Because Counsel for the General Counsel has offered no information about the investigation of this matter, he has not met his burden of showing that he was excusably ignorant and acted with reasonable diligence in attempting to uncover this alleged witness's testimony prior to the hearing, or in introducing it at the hearing." Specifically Respondent argues that Counsel for the General Counsel has offered no information about "whether he interviewed anyone prior to the trial or called the secret witness for any purpose at trial." Respondent further argues that Counsel for the General Counsel has not shown a scintilla of evidence to reflect that he was "excusably ignorant" of the alleged evidence. Contrary to Respondent's assertions however, the record reflects that Cynthia Arledge was called as a witness on behalf of Respondent in the April 2003 trial. Without extrasensory perception, there would have been no basis for Counsel for the General Counsel to seek out Arledge prior to the April 2003 trial. The record reflects that it was only because of Arledge's telephone call to Union Organizer Greg Boggs that Counsel for the General Counsel had any reason to contact Arledge. Additionally, as Counsel for the

General Counsel points out in his brief, Scott testified during the April 2003 trial that the attendance records introduced at the trial were true and accurate representations of his business records. Until Arledge contacted the Union, there would have been no reason for Counsel for the General Counsel to have known that Respondent's exhibits were anything other than what Respondent purported them to be. Thus, General Counsel was clearly excusably ignorant of any alleged alteration of documents prior to the newly discovered evidence. Additionally, the record reflects that once Counsel for the General Counsel learned of the alteration of the attendance records, the Regional Office initiated proceedings to obtain evidence that would be admissible and would support a motion to reopen the record. There is no dispute that even though Arledge initially spoke with the Union representative, she refused to cooperate with the Regional office, even when subpoenaed to do so. The Region was forced to petition the United States District Court for subpoena enforcement. It was not until December 5, 2003 that the Region obtained a deposition from Arledge and admissible evidence in its possession to support a motion to reopen the record. By December 31, 2003, the Region recommended to the General Counsel to seek to reopen the record and on January 20, 2004, the General Counsel's office notified the Region to proceed with the motion to reopen the record. On February 27, 2004, Counsel for the General Counsel completed its Motion to the Board seeking to reopen the record. Based upon the lack of cooperation from Arledge and the administrative delay of seeking enforcement, as well as the time required for seeking authorization from the Office of the General Counsel, I find that Counsel for the General Counsel acted with reasonable diligence in uncovering and presenting this newly discovered evidence.

In its opposition to Counsel for General Counsel's motion to reopen the record, Respondent also asserts that General Counsel failed to meet its burden of establishing that the alleged evidence would require a different result than that reached in the initial decision. Respondent argues: "Specifically, all CGC has to offer is the testimony of one unnamed witness who alleges that Respondent destroyed and altered attendance documents, and that Respondent applied its attendance policy in an inconsistent manner." Respondent contends that Counsel for the General Counsel is offering bare, unsubstantiated assertions in an effort to impeach or to call into question the sworn testimony of Respondent's witnesses that the attendance documents provided were accurate, and that the attendance policy was applied consistently. I find no merit in Respondent's argument. As stated above, a significant factor in my initial decision was my finding that Respondent met its *Wright Line*[8] obligation by showing that Huggins would have been disciplined even in the absence of his protected activity. Relying upon Respondent's attendance records, I found that Respondent disciplined other employees in the same manner and for the same reasons that it disciplined Huggins, establishing a lack of disparity in the enforcement of its attendance policy. The evidence identified in Counsel for the General Counsel's motion expressly relates to the issue of whether there was a true lack of disparity. Finding disparity in the enforcement of the attendance policy would clearly require a result different from that reached in my initial decision.

Respondent argues that it was prejudiced by the "secret" nature of the proceedings leading up to the reopening of this case. In his brief, Counsel for Respondent argues that Respondent has "suffered many unfair attacks by Region 15." Respondent asserts that the

[8] 252 NLRB 1082 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Region attempted and lost a Section 10(j) injunction effort and also lost most of its allegations regarding a mass layoff and recall that were litigated in a proceeding prior to this matter involving discriminatee Robert Huggins. Respondent contends that Region 15 continued with what Respondent characterizes as "unfair and improper efforts" against this employer with "eight months of secret proceedings, going to federal district court, and conducting an ex parte deposition of a secret witness presented by ex-Union Business Agent, Greg Boggs." Respondent argues that the identities of witnesses or allegations for Region 15 were not disclosed to Respondent or Respondent's counsel until after commencement of the re-opened hearing. Respondent also asserts that because two attorneys for the Region participated in taking Arledge's deposition, due process was violated. In support of this premise, Respondent asserts, "It is a basic premise of procedural due process that tag team ex-parte inquisitions are not allowed." Respondent, however, cites no Board or court authority for such a premise in Board proceedings.

In its brief and throughout the proceeding, Respondent continued to argue that Region 15's actions in this proceeding and prior proceedings were based upon some independent animus or bias against Respondent. Despite Respondent's continuing assertion, I found nothing to support this argument. The fact that the Region has previously sought injunctive relief and has issued complaints against this Respondent in this proceeding and in a prior proceeding does not support a finding that the Region has done anything other than to administer the Act as required. As Counsel for the General Counsel points out in his brief, there is no provision for discovery within the Board process.[9] In this instance, the Region deposed Arledge rather than using the traditional Board affidavit. Based upon Arledge's reluctance and previous refusal to give an affidavit to the Region, and based upon the order of the United States District Court, such a course of action was appropriate. There was however, neither a requirement for the Region to inform Respondent of this deposition nor a requirement to allow Respondent to participate in this deposition. As in any Board proceeding, there was no requirement for Counsel for the General Counsel to inform Respondent of the identify of this witness or any other witness prior to the witness testifying in a Board proceeding. While Respondent also argues that the allegations for the reopened hearing were not disclosed to Respondent, Counsel for the General Counsel's initial motion to reopen the record defeats such argument. The nine-page motion clearly identifies that the newly discovered evidence comes from a witness who worked for Respondent during the period when the alleged unfair labor practices occurred. Specifically, Counsel for the General Counsel asserted that the witness would testify that Jim Scott altered the attendance records of several employees prior to the April 2003 hearing. Additionally, the motion describes in detail how Scott altered the records to make it appear that Huggins was disciplined consistent with other employees. Clearly, the motion contained greater specificity than a traditional complaint that initiates a Board proceeding. Accordingly, I find nothing to indicate that the Region acted improperly in securing the evidence upon which it filed its motion.

In summary, I find that Counsel for the General Counsel has fully met all of the requirements of Section 102.48(d) of the Board's Rules and Regulations that allows the reopening of this record. Additionally, I find nothing in the record to support Respondent's assertions that the Region acted improperly in securing the evidence upon which it filed its

[9] Neither the constitution nor any statute requires making pre-hearing discovery routinely available. *David R. Webb Co.,* 311 NLRB 1135, 1135-1136 (1993).

motion or in failing to disclose the identity of witnesses prior to the reopening of this matter.

B. Respondent's Evidence Concerning Phelps' and Arledge's Conduct

If even half of Respondent's witnesses are to be credited, it is apparent that Phelps was anything but a model employee. Based upon these witnesses' testimony, the argument may also be made that he engaged in activities at Respondent's facility that served his own financial and personal interests and needs. The overall record testimony also demonstrates that he was by no means, the only employee who was actively involved in the use and exchange of prescription drugs. As a supervisor however, he was in a position that may have allowed greater freedom to engage in such activities. Respondent asserts that because Phelps' layoff terminated his opportunity to further engage in such conduct, his testimony is motivated by the loss of employment that allowed him to engage in such conduct. There is however, no record evidence that Phelps was terminated or that his layoff was for anything other than a reduction in force. Despite Respondent's assertions, Respondent presented no witnesses to testify that Phelps protested or resisted the layoff in any way. The only witness who provided any evidence that could arguably reflect a motive for revenge toward the Respondent was officer David Kania of the Bay County Sheriff's Department. Officer Kania confirmed that approximately a month after Phelps layoff, he investigated a burglary and theft at Respondent's facility. Because Phelps previously had keys and access to the facility, he was considered a suspect. Although he was questioned and polygraphed by the Sheriff's Department, he was never charged with the crime. There was however, no evidence that Phelps said or did anything following the investigation to demonstrate animosity toward Respondent for his being a suspect in the Sheriff Department's investigation.

With respect to Cynthia Arledge's involvement in the drug activity at Respondent's facility, Respondent presented the testimony of employee Brenda Foster, who testified that she observed Arledge giving prescription medication to Phelps. Foster also testified that Arledge provided drug-free urine to some employees for them to pass the mandatory drug screening. By Arledge's own admission, she was involved in a court-ordered drug program during a portion of her employment with Respondent. The fact that she may have given prescription drugs to other employees or even helped to undermine the validity of Respondent's drug screening program is not sufficient to discredit her testimony in the present proceeding. Having heard the overall testimony, I find nothing in this collateral evidence that provides a basis for impeaching the credibility of either Arledge or Phelps.

Rule 608(b) of the Federal Rules of Evidence expressly prohibits the use of "extrinsic" evidence of a witness' conduct (except for certain types of criminal convictions) to impeach the witness. Inquiry into such conduct is permitted, only if, in the discretion of the court, such conduct is probative of truthfulness or untruthfulness. See *U.S. v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996). Respondent argues that both Arledge and Phelps denied on cross-examination any involvement in drug sales, purchases, and other misconduct while employed at Respondent's facility. Respondent argues that its witnesses at trial provide credible evidence that Phelps and Arledge were not truthful in their responses. There is no dispute that the Board and the Courts have found that under Federal Rule 608(b); a witness' denial on cross-examination of a collateral matter precludes counsel from producing extrinsic evidence to contradict him. The extrinsic evidence is not considered for impeachment or for any other purpose. *Bronx Metal Polishing Co., Inc*., 276 NLRB 299 (1985); *U.S. v. Bosley*, 615 F.2d 1274 (9th Cir. 1980). It is the established rule that when a witness is cross-

examined for the purpose of discrediting his veracity by proof of specific acts of misconduct not the subject of a conviction, the examiner must take his answer as it is given and is not free to bring independent proof to show that the answer was untrue. *Foster v. U.S*, 282 F.2d 222, (10th Cir. 1960). The Board has long held that collateral evidence is not relevant to questions of veracity and therefore not admissible to impeach the witness. *Washington Forge*, 188 NLRB 90 (1971). Furthermore, the Board has long established that it is within the discretionary authority of the administrative law judge to apply the evidentiary limitation on impeachment of a witness in a collateral matter. *Tomatek, Inc*., 333 NLRB No. 156, fn. 36 (2001); *New York Sheet Metal Workers, Inc*., 243 NLRB 967, fn. 3, (1979); *Continental Wirt Electronics*, 186 NLRB 56 (1970).

In his brief, Counsel for Respondent acknowledges that under 608 of the Federal Rules of Evidence, evidence of specific instances of conduct offered for the sole purpose of attacking the witness' truthfulness may not be proven by extrinsic evidence. Citing *U.S. v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) and *U.S. v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), Respondent asserts that Rule 608(b) does not prohibit the use of extrinsic evidence to prove bias, competency, and impeachment by contradiction. Respondent also argues that under Federal Rule 404(b),[10] evidence of other crimes, wrongs, and acts may be admitted into evidence when offered not to prove character, but for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident. Citing *Huddleston v. U.S*., 485 U.S. 681, 686 (1988), Respondent submits that the threshold inquiry for a 404(b) analysis in both civil and criminal cases is whether the evidence is probative of a material issue other than character. Respondent argues that the offered testimony in this case is admissible and highly probative on the issues of (1) Phelps' and Arledge's bias toward Sunshine Piping; (2) Phelps' and Arledge's ability to accurately recall and relate the events in dispute; and (3) the contradiction of Phelps' and Arledge's testimony denying that they used and were dealing drugs at work.

In *U.S. v. Castillo*, the issue before the court was whether evidence of the defendant's prior cocaine arrest was admissible as impeachment by contradiction. In referencing two earlier Ninth Circuit decisions, the Court pointed out that extrinsic evidence might not be admitted to impeach testimony invited by questions posed during cross-examination. The Court went on to explain: "Courts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination." While the court added that it was not finding that a bright line distinction between testimony volunteered on direct examination and testimony elicited during cross-examination must be rigidly enforced so as to exclude all impeachment by contradiction of testimony given during cross-examination, the court nevertheless expected that the exception to the rule would apply to those rare situations where the testimony on cross examination was truly volunteered. *U.S. v. Castillo*, *supra* at 1134. In *U.S. v. Tarantino*, the court discussed exclusion of collateral evidence used for impeachment. While the court did not find the testimony in issue to be collateral, it nevertheless concluded that its exclusion by the trial court was not an abuse of discretion. *U.S. Tarantino* at 1410. Upon review of these cases and others[11] cited by Counsel for Respondent in his brief, I find

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[10] Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

[11] In *U.S. v. Fleming*, 19 F.3d 1325, 1331 (10th Cir. 1994), cited by Respondent, the court found that the limitations of Rule 608(b) did not apply when extrinsic evidence is used to show that a

Continued

nothing that would support the admission of the collateral evidence offered in this matter. In his brief, Counsel for Respondent asserts that both Arledge and Phelps volunteered the issue of drug use on direct examination. Counsel does not however, cite any transcript reference in support of this bare assertion. While Arledge confirmed on direct examination that she had been on probation with a suspended license at the time of her employment with Respondent, she neither testified concerning drug use nor denied drug use as Counsel for the Respondent gratuitously asserts in his brief. Phelps' direct testimony did not in any way relate to anyone's drug use. Accordingly, there is no basis in fact for Counsel's assertion and such a blatantly erroneous assertion undermines the persuasiveness of Respondent's brief.

Respondent argues that impeachment by contradiction with collateral facts is governed by 607 of the Federal Rules of Evidence and the balancing test under Rule 403, not Rule 608. Respondent also argues that courts should more liberally allow impeachment by contradiction on matters elicited on both direct and cross-examination. Despite counsel's opinion that the courts should more liberally allow impeachment by contradiction, he provides no Board authority in support of his argument. Respondent characterizes the testimony in issue as "impeachment by contradiction" and argues that such a means of impeachment is outside the scope of the limitations of Federal Rule 608(b). Clearly the testimony that Respondent seeks to be considered deals with matters not only unrelated to whether Respondent altered attendance records but also unrelated to any substantive issue in this proceeding. If not to impeach the credibility of Phelps and Arledge, there is no apparent relevance. Accordingly, I find no basis to consider this evidence as impeachment by contradiction.

Respondent argues that the testimony relating to Phelps' and Arledge's prior conduct in the workplace shows that their testimony concerning the alteration of the attendance records was biased. Respondent argues that the testimony is issue shows that when Phelps was laid off, he lost a source of drugs and lost income from the sale of drugs and company-owned equipment. Respondent also points out that Phelps was the lead suspect in a police investigation of break-ins at Respondent's facility. Respondent asserts that the testimony in issue shows that Arledge had a strong motive to retaliate against Respondent because she lost drug connections and did not receive compensation from her worker's compensation claim. Citing *U.S. v. Farias-Farias*, 925 F.2d 805, 811 (5th Cir. 1991), Respondent asserts that the disputed testimony is admissible because extrinsic evidence of prior bad acts is admissible to show bias and prejudice. I do not find the case cited by Respondent to be

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statement made by a defendant on direct examination is false, even if the statement is about a collateral issue. In *U.S. v. Cardenas*, 895 F.2d 1338 (11th Cir. 1990), the court found that witnesses' testimony as to defendant's prior offenses of narcotics possession and distribution was admissible to contradict material testimony of defendant charged with cocaine distribution, conspiracy, and cocaine possession with intent to distribute. In *U.S. v. Mateos-Sanchez*, 864 F.2d 232 (1st Cir. 1988), the court allowed extrinsic evidence of marijuana being found in the defendant's brief case after he testified that he did not use drugs. Inasmuch as the defendant was tried for possession, importation, and intent to distribute cocaine, it is not surprising that the court found that the defendant's personal use of drugs could be particularly probative of motive, knowledge, or absence of mistake or accident. Respondent concedes that other cases cited dealt with impeachment by contradiction when the party or witness against whom it is used testified as to the collateral matters on direct examination or otherwise opened the door on the issue. *Jones v. Southern Pacific R.R.*, 962 F.2d 447, 450 (5th Cir. 1992); *U.S. v. Benedetto*, 571 F.2d 1247, 1230 (2nd Cir. 1978).

controlling in this situation. In *U.S. v. Farias-Farias*, the court noted that Rule 608(b) is not intended broadly to restrict the introduction of exculpating or incriminating substantive evidence. Evidence concerning the defendant's false statements given at the time of his arrest as substantive evidence of guilt was found to be admissible despite the restrictions normally imposed by Rule 608(b).

As otherwise stated in this decision, I do not find that the testimony in issue demonstrates bias or prejudice by Phelps or Arledge. As noted above, there is no evidence that Phelps protested or resisted his layoff as a part of Respondent's reduction in force. There is absolutely no evidence that Phelps said or did anything to demonstrate animus toward Respondent for his layoff or even for his having been questioned by the authorities concerning the theft at Respondent's facility. As also otherwise noted, there is no evidence that Arledge's testimony was motivated by bias or prejudice. It is undisputed that she quit her employment and was not the subject or discipline or discharge. She testified without dispute that her contact with the Union concerning the altered documents occurred prior to her filing any claim for worker's compensation. Accordingly, I do not find Respondent's collateral evidence admissible as bias or prejudice.

Respondent also contends that the disputed testimony is admissible to show the capacity of Arledge and Phelps to accurately recollect and relate. Respondent asserts that the testimony concerning the drug use of Phelps and Arledge is highly probative of their ability to recollect and understand whether Respondent improperly altered the attendance records. The overall record evidence belies any validity to this argument. While Respondent now argues that Phelps was under the influence of drugs and therefore impaired in memory and functioning, Phelps nevertheless held the position of production manager in 2002 and until his layoff in 2003. Had Phelps' functioning been impaired to the extent argued by Respondent, it is doubtful that Scott would have allowed him to maintain in such a responsible position. I also note that Respondent had sufficient confidence in Phelps that Phelps was called as Respondent's witness in the April 2003 trial.

While Respondent argues that Arledge's testimony may be impeached because of extrinsic evidence of drug use and involvement, Respondent's argument is even less compelling than with the argument made for Phelps. As noted above, Respondent certainly presented a plethora of testimony concerning Phelps' involvement in drug use and trafficking in the workplace. By contrast however, Respondent's evidence concerning Arledge's involvement in drugs was minimal. While Respondent's witnesses testified that she had shared prescription drugs with other employees and had even provided clean urine to employees in order that they might pass drug screenings, the evidence also reflects that for a substantial portion of the relevant period, she was involved in a drug rehabilitation program and required by the court to undergo routine drug screenings. Thus, the overall evidence simply does not reflect that Arledge's recall was impaired or could have been impaired because of drug activity.

In summary, Respondent argues that the evidence of prior specific acts is offered and probative on other grounds and not solely to attack the witnesses' truthfulness as contemplated by Rule 608(b). I have considered Respondent's arguments and I do not find the proffered evidence to be probative or admissible on bias, competency, or impeachment by contradiction. Counsel for the General Counsel argues that the testimony involving these collateral issues be stricken from the record. While I do not grant Counsel for the General Counsel's motion, I find no relevance in such testimony and place no reliance upon this

testimony concerning clearly collateral matters.

C. Analysis of Arledge's Testimony and the Attendance Records

As discussed in my June 30, 2003 decision, Respondent implemented a new attendance policy on May 6, 2002. The policy provides for progressive discipline for its infractions and the progression includes a verbal warning, a written warning, a suspension, and ultimately discharge for any one of the four types of violations. The policy can be violated when an employee is absent, tardy, leaves early, or has a time card discrepancy that is not excused. The policy provides that four unexcused incidents of the same kind of violation occurring in any twelve (12) month calendar period will result in discharge. With respect to the attendance policy, the complaint that issued in this case alleged that Respondent unlawfully issued Huggins a verbal warning on September 18, 2002 as well as written warnings on August 30, 2002 and September 13, 2002. Additionally, the complaint alleged that Huggins' suspension on September 4, 2002 and his termination on September 30, 2002 violated Sections 8(a)(3) and (4) of the Act. The attendance records submitted by Respondent at trial demonstrated that prior to testifying in an August 26, 2002 Board proceeding, Huggins received discipline when he failed to provide documentation of his absences and he had been excused when he had provided the required documentation of his absences. The records also established that other employees were disciplined for the same offenses for which Huggins received discipline. Specifically, I noted in my decision that Respondent's records confirmed that during the relevant time period 105 other employees received verbal warnings and 53 other employees received written warnings. I also found it significant that during this same time period, 25 other employees received suspensions and 5 other employees were terminated. Thus, relying in large part upon Respondent's attendance records, I found that Respondent demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.

As discussed above, Arledge testified that prior to the April 2003 trial, she participated in the review and reconstruction of Respondent's attendance policy documents. Arledge recalled that during the records review, Scott used red ink to make changes in the original attendance records. After completing the review of the record, new documents were created and Arledge made the necessary changes in the computer to correspond to Scott's changes in red ink. She recalled that once the changes were made in the computer, a corrected printout of the employee's attendance was printed.

Scott testified that after changes were made in the attendance files, Arledge input the changes into the attendance database and then printed a new database summary for his review and comparison with the former printout. Scott testified that he assumed that she threw away the old database printout. Scott did not testify as to what happened to the corrected or changed disciplinary action forms. Arledge testified that she had understood that the documents containing the changes in red ink were later destroyed.

Counsel for the General Counsel submitted into evidence a number of documents from various employees' attendance files. While Respondent disagrees with the relevancy of many of these documents, there is no dispute that the documents were copies of records that were subpoenaed by Counsel for the General Counsel in anticipation of the re-opened hearing. Counsel for the General Counsel asserted that many of the documents were color-copied for their submission into evidence. Those documents that are color-copied

demonstrate different colors of ink for the completion of the disciplinary action forms. Other documents that are not color-copied demonstrate some differences in print shading. A substantial number of the documents submitted by Counsel for the General Counsel reflect changes and modifications to disciplinary action forms. Based upon the disciplinary action forms admitted into evidence, it is apparent that at least a number of the forms changed during Scott and Arledge's six-week review were left in the attendance files.

Counsel for the General Counsel submitted attendance records for employee Kenneth Graff[12] that include a disciplinary action form with an original date of May 22, 2002 that is corrected to May 21, 2002. The following notation is found in blue ink: "Employee was absent on May 21, 2002 with no prior permission. Employee has prior permission for 5-22-02. Employee did call work states car problems." Also originally written in blue ink is the notation: "2nd Un-excused absence." The document also contains red ink and yellow highlighting noting: "Employee has receipt for old car – to fix other car per: Mr. Scott – said receipt would excuse Employee –." The original wording "2nd Un-excused absence" is marked through in both red and yellow highlighting. The red ink additions and corrections on Graff's disciplinary action form convert the absence from unexcused to excused.

Arledge also testified that during the review of the attendance records, Katherine Gay's file was changed[13]. Arledge recalled that while some of Gay's absences and tardiness had not previously been considered for disciplinary action, Scott added additional documents and changed the file during the pre-trial review. Arledge also recalled that at Scott's direction, she prepared typewritten notes explaining why earlier discipline had not been administered to Gay. Counsel for the General Counsel submitted into evidence a disciplinary action form for Gay that is dated June 11, 2002. The form appears to be a copy of the original document and does not reflect the ink color for any notation on the document. The document contains what appears to be more than one person's handwriting in different print shades and is signed by Supervisor Kevin Scott. In one person's handwriting are the words "Excused Tardy" and "Employee is in Shipping Dept – Family Problems." In what appears to be a darker print and another person's handwriting are the words "Suspension on 6/25/02" and "Unexcused per JRS." Written above and in front of the word "Excused" are "3rd" and "Un" and appear to be written in a darker print and different handwriting. Gay's record also contains a typewritten note that is dated June 21, 2002 and signed by Scott. The note states:

> I WAS NOT MADE AWARE OF KATHERINE K [G] AY'S BEING TARDY A THIRD TIME, UNTIL I WAS INFORMED OF HER TARDY ON JUNE 18, 2002 AT 7:13 A.M., AT WHICH TIME I TOOK DISCIPLINARY ACTION AND SUSPENDED THIS EMPLOYEE FOR THREE DAYS. THREE DAYS SUSPENSION EFFECTIVE ON JUNE 25 THRU JUNE 27, 2002 AND HOPE THAT SHE (KATHERINE GAY) WILL CONFORM TO THE RULES AND REGULATIONS OF COMPANY POLICY AS SHE IS A GOOD EMPLOYEE DESPITE HER EXCESSIVE TARDIES.

Arledge identified the above-typewritten note as one that she prepared at Scott's direction when Gay's file was altered. Although the note is dated June 21, 2002, Arledge

12 General Counsel Exhibit No. 26.

13 General Counsel Exhibit No. 17.

testified that it had been prepared when she and Scott reviewed the files prior to the April 2003 hearing. Gay's file also contains disciplinary action forms dated May 15, 2002 and May 20, 2002 and relate to tardiness. The disciplinary action form dated May 20 documents that Gay received a written warning for her second tardy. The disciplinary action form for May 15, 2002 includes the notation: "Employee did call and let Supervisor know that she would be late. Sister had car problems [.] An Employee went to pick her up." Written underneath this notation is the additional wording: "This is the Employee's (illegible) Tardy." The word appears illegible as the original word or notation is covered by darker markings, however, the notation appears to be changed to "1st."

Arledge also recalled that changes were made to the file for Gerald Nelson[14]. Arledge identified a disciplinary action form in Nelson's file dated September 25, 2002. The comment section of the document reflects that Nelson did not return from lunch until 12:39. The form indicates that initially the incident was considered to be his first unexcused tardy. The notation of "1st unexcused" is marked through and the word "excused" is circled. In parenthesis are the words "Prior permission given." Arledge explained that she and Scott changed the absence to excused because otherwise a first unexcused tardy would have "messed up" his record. Accompanying the September 25, 2002 disciplinary action form and the computer printout for the incident is a document entitled "Request for Time Off" dated September 25. The form is signed by supervisor Harry L. Nelson and Vice President Kevin Scott. It does not include the employee's signature. The form explains that the employee went to his son's school during lunch and "Prior permission requested with management." Arledge explained that during the 2003 records review, she and Scott added forms such as this to substantiate that attendance infractions were excused.

Arledge also testified that she vaguely recalled changes made to Nelson's file concerning a July 5, 2002 incident in which he left early. While the form reflects that Nelson was initially given a verbal warning for leaving work at 3:21, the form includes the additional wording: "Prior permission" and the word "Excused" is circled. The letters "UNX" are marked through and initialed by Scott. Arledge explained that this incident was changed to excused because otherwise his record would have necessitated a subsequent suspension that was not substantiated by his time card.

Arledge recognized disciplinary action forms that had been changed in Rachael Cutchen's attendance records.[15] Arledge testified that she and Scott altered Cutchen's disciplinary action form dated May 16, 2002 to change a second unexcused tardy to a first unexcused tardy. The document identified by Arledge reflects that the "2nd tardy" has been marked through and changed to "1st unexcused per Mr. Scott." The disciplinary action form for Cutchens dated September 5, 2002 reflects that the original designation of "2nd" time card discrepancy has been marked through. Arledge recalled that this time card discrepancy would have been the third for Crutchens triggering her suspension. Arledge testified that the records were "fixed" to avoid the suspension.

Arledge confirmed that the disciplinary action form for Robert Waldrup originally dated May 14, 2002 and changed to an effective date of May 13, 2002 was altered.[16] The

[14] General Counsel Exhibit No. 20.
[15] General Counsel Exhibit No. 24.
[16] General Counsel Exhibit No. 44.

comments section of the document reflect that the employee was absent on Monday May 13 because he was still on medication from a doctor's appointment from a dental appointment on the previous Friday. The comments confirm that his supervisor excused him. The document reflects however, different handwriting that designates the absence as unexcused. Arledge explained that Scott changed records from excused to unexcused in order that Respondent would not appear biased.

Arledge testified that she had not wanted to come forward to give a statement or deposition to the Board because she feared Scott and what he might do to her. In explaining why she thought that Scott would retaliate against her, she recalled conversations with Scott about employees who had supported the Union. She recalled that her told her on numerous occasions that he would get rid of the employees who had signed the Union "form." Arledge testified that Scott told her that he had a list of employees who had "signed the union." She heard Scott tell Phelps to give Huggins a hard time, including the worst jobs that Huggins would have difficulty performing. Scott had also directed her to scrutinize Huggins' time card. She added that because of Scott's personality and vindictiveness, she feared that Scott would take action against her. When asked why she believed Scott to be vindictive, she explained that she had worked beside him and heard him every day.

As a further example of why she feared retaliation from Scott, she recalled Scott's comments involving employee Gary Elmore. She explained that while Elmore initially signed the "union paper," he later came to Scott and tried to make amends for what he had done. Elmore apologized and volunteered to go to all the employees who had signed for the union and get them to sign another document stating that they had not understood what they had done. Arledge recalled:

> And I watched Mr. Elmore pour his heart out, and I seen him go around with this paper, and Mr. Scott looked at me, and he said, That son of a bitch ain't going to work here. Let him get all my signatures; I'll get him.

While Arledge quit her employment approximately a month after the 2003 hearing, she nevertheless feared retaliation from Scott. During Arledge's employment, there was no secret that she was required to attend drug court and undergo daily drug testing. At the time that she left Sunshine Piping, Inc. and continuing until the time of the 2004 hearing, Arledge's driver's license remained suspended. Arledge testified that because of Scott's ties to the local police, she feared that he could retaliate against her and report that she sometimes drove on the suspended license.

D. Credibility Determinations Concerning Arledge and Phelps

Respondent argues that Arledge and Phelps cannot be credited for a number of reasons. As described above, Respondent presented a plethora of witnesses who testified concerning Phelps' involvement in the trafficking and abuse of prescription drugs while employed as a supervisor in Respondent's facility. While this collateral evidence reflects that such conduct may have been inappropriate or unlawful, it cannot be used as a basis to discredit Phelps' direct testimony in this matter. I would note however, that Phelps' testimony lacked a sufficient degree of specificity with respect to the issue of whether records were

fabricated and destroyed.[17] At best, his testimony provided some degree of corroboration for Arledge's testimony. He did however, corroborate that he observed Arledge and Scott reviewing the attendance records during the period prior to the April, 2003 hearing. He also recalled that he was asked to re-sign attendance records during this period of time. Respondent argues that Phelps testified against Respondent as a means of retaliating against Respondent for his loss of employment. As discussed above however, I find nothing in the record to support such a proposition. There is nothing to reflect that Phelps harbored any animus toward Respondent for his layoff resulting from a reduction in force. Had Phelps fabricated his testimony solely to avenge his layoff, his testimony would surely have been more expansive and damaging. At best, he simply corroborated a portion of Arledge's more complete testimony. Accordingly, his testimony is less suspect because it is without apparent exaggeration. In view of Phelps' overall testimony, I find him to be a credible witness.

Respondent also asserts that Arledge is not believable for a number of reasons. Respondent contends that Arledge is not credible because Respondent's witnesses contradicted her denials on cross-examination of any involvement in the drug activity at Respondent's facility.[18] Respondent also argues that Arledge is not credible because Respondent contested her claim for worker's compensation that she filed after leaving Respondent's employment. I note however, that Arledge testified without rebuttal that she spoke with Union Representative Boggs before she filed a worker's compensation claim.

There is no question that Arledge exhibited emotional distress during her testimony. Because of her emotional state, the completion of her cross-examination was interrupted and ultimately delayed until the following trial day. After a significant number of hours of cross-examination, Arledge was offered additional time to regain her composure. She responded:

> No, I need to go home. That's all. I just need to get out of here. I don't even care if you all hang him or not. It don't matter to me. I mean, he's the one — she[19] [he] duped you, not me.

While Arledge was emotional and at times almost tearful, her testimony was overall consistent and without apparent embellishment or fabrication. There is no dispute that Arledge participated in giving a deposition only because she was under order of the United States District Court. Based upon her actions during the August and October trial dates, I have no doubt that her testimony in the Board hearing was given only because of the outstanding subpoena. At least twice during the proceeding, she was reminded by counsel and by the undersigned that she was not released from the subpoena. While she appeared to be frustrated and even somewhat resentful of the government's requirement that she participate in the Board process, she nevertheless testified consistently and credibly. She

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[17] Phelps testified that prior to his giving Huggins' an unexcused tardiness related to his son's head being caught in a couch, employee John Frye was excused for an absence involving a similar experience with his son. While Huggins was disciplined on July 2, 2002, Phelps identified a September 30, 2002 document from Frye's file as possibly the incident involving the related absence.

[18] I note that one of the contradictions mentioned in Respondent's brief was Respondent's offer of proof for a proposed witness for whom Respondent wanted to present in telephone testimony. His motion was denied.

[19] The transcript incorrectly included "she" rather than "he."

clearly appeared as a witness who told the truth despite a reluctance to participate in the process. I found her testimony to be totally credible. There was nothing in her demeanor to indicate in any way that her testimony was contrived, prevaricated, or motivated by her desire to retaliate against Respondent. Her reluctance to testify actually enhanced her credibility. Having heard this witness testify on direct and cross for extended hours of examination, I am convinced that her testimony was an accurate and truthful recall of the events preceding the April 2003 hearing in this matter. I find nothing in her testimony or demeanor to reflect a lack of competency or bias as Respondent asserts. I find her testimony to be credible evidence that Respondent altered, created, and destroyed a number of attendance records in anticipation of a Board hearing in this matter.

E. The Credibility of Respondent's Witnesses

Scott admits that he and Arledge conducted a six-week review of the attendance records. Additionally he acknowledges that during the review, he retroactively changed attendance documents during the process. Both Jim Scott and Kevin Scott testified that the review was conducted in October 2002. There is no dispute that the Union filed the charge in this case on October 4, 2002 and Scott admits that he received a copy of the charge in October.

Jim Scott testified that the six-week audit of the attendance records was conducted because he discovered errors in Arledge's monitoring of the policy. He asserted that documents had to be changed because of Arledge's errors. Respondent also called Kevin Scott, Jim Scott's son, as a witness in this proceeding. Both Jim Scott and Kevin Scott testified that Kevin Scott signed off as authorizing supervisor for any discipline under the policy that involved only a verbal or written warning. Kevin Scott also admitted that Arledge appeared to be correctly submitting the attendance documents to him while it was his job to receive them from Arledge for the period from July to October 2002. He also acknowledged that he would not have known if Arledge failed to call an attendance violation to his attention because he did not independently check the employee time cards or the computer database. He admitted, that, if he had thought that Arledge was doing a bad job with the attendance records, he would have done his own investigation.

While Jim Scott asserted that Arledge's mistakes were sufficient to require his doing a six-week review of the records, no disciplinary action was taken against Arledge. While Scott contends that Arledge made mistakes sufficient to require an audit, Respondent did not call Goldberg or any other witness to corroborate this reason for the audit. Kevin Scott testified that while he was aware that Arledge and Scott were making changes in the attendance records, he was not involved in the audit or aware of the specific changes made during the audit. Based upon his overall testimony, I do not find Jim Scott's testimony to be credible. Scott attempted to show that the reason for the alteration of the attendance documents was to correct mistakes that were the result of Arledge's negligence and a part of his efforts to fairly administer the attendance program. His testimony however, indicates that a motivating force in his alteration of the attendance records was his concern about going to court. He acknowledged: "I was the one that was going to have to stand here in front of a judge…." On cross-examination, Scott confirmed that Huggins was fired at the end of September 2002 and he then received an unfair labor practice charge in October. When he was asked if it had occurred to him that an investigation or even possibly a hearing would occur where attendance records might be in issue, Scott replied that it had occurred to him long before he received the charge.

It is certainly reasonable that even before Huggins' discharge and certainly after receipt of the charge, Scott had some expectancy that his records might become the subject of an investigation. As of the time of his October audit of the attendance records, he had already participated in the August 2002 unfair labor practice proceeding in which Huggins had testified. Having just experienced an unfair labor practice trial, it is reasonable that he would have been knowledgeable about preparing for an unfair labor practice proceeding with an awareness of what kinds of documents may be scrutinized in such proceedings.

On the basis of the entire record testimony, I find credible evidence that Respondent altered its attendance policy records to cover its disparate treatment of Huggins under its attendance policy. Having made that determination, I must amend my earlier findings in this case. As discussed above, my failure to find a violation in the Respondent's discipline to Huggins for attendance policy infractions was based in large part upon the lack of disparity as shown by Respondent's attendance records. This conclusion however, was premised upon the accuracy and veracity of the records. Crediting the testimony of Arledge, and as corroborated by Phelps, I cannot rely upon Respondent's records as accurate and genuine representations of Respondent's administration of its attendance policy. Accordingly, Respondent has failed to meet its burden under *Wright Line* in showing that it would have disciplined Huggins even in the absence of his protected activity. Based upon the total record evidence, I amend my decision to also find that Respondent unlawfully disciplined and ultimately discharged Huggins under the existing attendance policy in violation of Section 8(a)(1), (3), and (4).

V. Additional Issues Arising From the Proceeding

A. General Counsel's Motion to Amend the Complaint To include an Additional 8(a)(1) Allegation

During the course of the hearing, Counsel for the General Counsel moved to amend the complaint to allege Respondent's counsel as an agent of Respondent. Based upon testimony elicited on cross-examination, General Counsel also moves to amend the complaint to allege that on or about October 2004, Respondent's counsel interrogated employees regarding their support of the Union and failed to provide them proper assurances when interviewing them in connection with the instant case. Counsel for the General Counsel confirms that the complaint amendment is sought solely upon the testimony of Respondent employee witness Gary Wayne Elmore. In *Johnny's Poultry*, 146 NLRB 770 (1964), the Board set forth its policy of permitting employer's to conduct employee interviews in order to ascertain facts necessary for the preparation of its defense against charges issued. The established policy requires that the employer must communicate the purpose of the interview and assure the employee that no reprisals will take place. Additionally, the employer must obtain the employee's participation on a voluntary basis and the questioning must occur in a context free from employer hostility to union organization. Finally, the questioning must not be coercive in nature and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, or elicit information concerning the individual's state of mind, or otherwise interfere with the statutory rights of the employee.

Elmore testified that prior to the trial,[20] he met with Respondent's counsel in the copy room at Respondent's facility. Respondent's counsel, herein Griffin, explained that he was meeting with Elmore because the company was going to court over the union matter. Elmore could not recall whether Griffin communicated anything further as to the purpose of the meeting. Elmore recalled that Griffin asked him some of the same questions that were asked of him on direct examination. Elmore did not remember if Griffin explained why he was asking those questions. Elmore recalled that while he discussed with Griffin his signing a union card; he also recalled that he told Griffin about his being solicited to sign a union card by supervisor Steven Phelps. When asked by Counsel for the General Counsel whether Griffin said anything that sounded like he was promising or assuring that there would be no reprisals, Elmore responded in the negative. Specifically, he was asked: "Okay. Now, when he asked you that question or questions, did he give you any assurance or make any promise as to no retaliation, no reprisals, you know, based upon your answer?" Elmore responded: "No Sir."

On further examination however, Elmore acknowledged that he did not fully understand Counsel's question. He readily explained:

> Well, the only thing that I understand is that he said that this is strictly - - everything that we're going to talk about is strictly voluntary. He told me that I could get up and walk out anytime I wanted to, so I had no problem. He says, if you feel uncomfortable with the conversation, you get up and walk out anytime you want to. Everything that we did that day was strictly voluntary.

When asked if he understood the meaning of the word "retaliation," Elmore explained: "I'm not on the big word thing." Elmore also acknowledged that he did not know the meaning of the word "reprisal." When it became apparent that the witness did not understand the questions being asked of him on cross-examination, he was asked if he understood what Griffin was saying to him and if Griffin's words made him feel like he could say what he wanted and he didn't have to worry about anything happening to his job. Again, Elmore testified that he had felt comfortable with the meeting with Griffin. He explained how Griffin put him at ease and gave him assurances that the meeting was completely voluntary and that he could walk out if he felt comfortable. Elmore explained that he felt comfortable sitting with Griffin and answering his questions. He explained:

> And if there was something I didn't understand, I would ask him to repeat it or whatever. I'm not a real smart man. I'm just a fairly simple man, so I think he probably knew that and he just - - he made everything simple for me.

Elmore's overall testimony fully supports the conclusion that Griffin's interview was completely free of coercion or hostility. I found nothing in Elmore's testimony to indicate that he was pressured or that he felt any obligation to testify on behalf of Respondent. Despite his initial responses, it was apparent that he did not understand Counsel for the General Counsel's questions and he had no understanding of the meaning of the words "retaliation" or "reprisal." I note that while Elmore acknowledged that he told Griffin that he had signed a union card, there is other record testimony that diminishes the coercive nature of such an

[20] There is no dispute that Elmore's meeting with Griffin occurred prior to and in preparation for the reopened hearing originally scheduled on August 10 and continued on October 12, 2004.

inquiry. Arledge testified that Elmore came forward voluntarily in 2002 and told Scott that he had signed "the union paper." Arledge also recalled that Elmore volunteered to go back to other employees and solicit their acknowledgement that they had not understood what they were doing when they initially signed for the union. Thus, crediting Arledge, I find that there was no interrogation of Elmore as he had already voluntarily shared this information with Scott two years previously. Based upon the overall record testimony, I find no evidence that Griffin exceeded the bounds of legitimate pre-trial preparation or that Elmore participated in the meeting without adequate assurances. Accordingly, I deny General Counsel's motion to amend the complaint as alleged, finding no evidence to support that Respondent violated Section 8(a)(1) by interrogating an employee as alleged or by failing to comply with any pertinent aspect of *Johnny's Poultry* assurances.

B. General Counsel's Motion to Strike Jay Cowick's Testimony

When the hearing commenced in this re-opened matter on August 11, 2004, the parties and counsel were reminded that a sequestration order remained in effect from the 2003 trial period. Because of an unplanned interruption in the hearing, there was a two-month recess prior to reconvening on October 12. During both the August and October 2004 sessions, the Union's lead organizer; Curt Tharpe, appeared on behalf of the Union as the charging party. Additionally appearing in the hearing room on October 12 were two individuals who identified themselves as affiliated with the Union. Charlie Long, who introduced himself as a Union organizer, explained that while he was attending the hearing that day, he would not testify. Jay Cowick identified himself as the business manager for the Union's local. Respondent's counsel confirmed that he had not subpoenaed either individual and understood that they were present as union representatives. He added however, that while he did not know whether he would need to call either individual, he wanted to reserve his right to do so if it became necessary. Respondent's counsel moved to expand the reservation of the sequestration order. Inasmuch as Respondent's counsel could not represent an expectation or intention to call either individual, no expansion was granted and the parties were again advised of the applicable rule.

Later in the day on October 12, Respondent called Jay Cowick as a witness. Cowick testified that as the business manager for the Union, he was union organizer Greg Boggs' boss. Cowick explained that while Boggs filed the original charge in this matter, he was no longer with the Union. Additionally, Cowick testified that he had not given Boggs authorization to present Steven Phelps and Cynthia Arledge as witnesses to the Board. When Counsel for Respondent inquired as to whether Cowick would have authorized their presentation if had known of Phelps' and Arledge's background, Counsel for the General Counsel's objection was sustained. Counsel for Respondent submitted that such opinion testimony was relevant because of Respondent's objections to the reopened record. As Respondent's offer of proof, Cowick denied that he would have authorized the presentation of Arledge and Phelps if he had known their backgrounds. Cowick also testified that he had not authorized the initial charge and opined that Boggs had a grudge and vendetta against Jim Scott.

While Counsel for the General Counsel did not object to Respondent's calling Cowick as a witness, Counsel for the General Counsel later moved that Cowick's testimony be stricken as a violation of the sequestration order. Rule 615 of the Federal Rules of Evidence provides that upon motion of a party or on upon its own motion, the court shall order witnesses excluded from the courtroom so they cannot hear the testimony of other

witnesses. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is show by a party to be essential to the presentation of the party's cause or (4) a person authorized by statute to be present.

Very often the remedy for a violation of a sequestration order is to not credit the challenged testimony. See *Zartiac, Inc*., 277 NLRB 1478 (1986), *Unga Painting*, 237 NLRB 1306 (1978). As the Board pointed out in its *Unga* decision, "the purpose of exclusion is preventative; it is designed to minimize fabrication and combinations to perjure as well as mere inaccuracy." The Board also noted that it prevents the witness from hearing suggestions, whether conscious or unconscious, from which testimony may be shaped. In the instant matter, there is no dispute that Cowick sat through a major portion of Arledge's cross-examination.[21] It is also without dispute that his testimony did cover any of the same topics or relate in any way to the testimony given by Arledge. At best, Cowick's testimony was offered as an evaluation of Arledge as a witness and an endorsement to disregard Arledge's testimony. Accordingly, inasmuch as there is no apparent factual correlation to Arledge's testimony, I find no basis to strike Cowick's testimony. With respect to the significance or to the weight to be given, however, I find no apparent relevance. Inasmuch as only the General Counsel has the authority to investigate additional unfair labor practice violations and thereafter expand the scope of a complaint,[22] Cowick's "opinion" on Arledge's and Phelps's background is irrelevant. Accordingly, I give no weight to his testimony.

C. General Counsel's Motion to Amend the Complaint To Include a Request for Special Remedies

Counsel for the General Counsel also seeks to amend the complaint to expand the requested remedy. Specifically, General Counsel seeks an Order requiring Respondent to reimburse the Board for all costs and expenses incurred in the investigation, preparation, and conduct of the hearing that opened on August 10, 2004 concerning the documents that are alleged to have been altered in connection with the hearing that opened on April 28, 2003 before the National Labor Relations Board and the courts.

The two issues that must be resolved with respect to General Counsel's motion to amend the complaint to expand the remedies involve not only appropriateness but also timeliness. General Counsel did not move to amend the complaint to include this remedy until the fifth day of trial and nine weeks after the trial opened on August 10, 2004. Additionally, I note that General Counsel's October 14, 2004 motion to amend the complaint to include these special remedies came almost five months after the Board's Order and over three months after my order issued reopening the record and setting the matter for hearing. In my order reopening the record and dated July 8, 2004, I referenced conference calls with

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[21] In its brief, Respondent asserts that Cowick "heard substantial testimony from numerous credible witnesses" that contradicted Phelps and Arledge with respect to the alleged drug usage. Respondent has patently exaggerated the record. Prior to testifying, Cowick was present during only one trial day and heard a portion of Arledge's cross-examination and the brief examination of only one other witness.

[22] *West Virginia Baking Corp*., 299 NLRB 306 (1990). Section 102.17 of the National Labor Relations Board Rules and Regulations.

the parties on June 25 and June 29, 2004 in which Respondent's counsel raised the issue of prejudice by reopening the record without further pleadings. In my order, I responded to Counsel's concerns and I specifically noted that General Counsel's motion to reopen the record had such specificity that it was in fact more explicit than a traditional complaint. It should be noted however, that Counsel for the General Counsel did not request or reference any intent to request special remedies in the extensive motion to reopen the record.

Section 10266.1 of the Board's Casehandling Manual provides that when the remedy sought is novel or unique, the complaint should contain a separate request for remedial relief in order to provide respondent adequate notice. Section 10268.1 also provides that where the Regional Office's determination of the need for a special remedy arises only after issuance of complaint, the respondent should receive prompt notification and the complaint should be amended. Section 102.17 of the Board's Rules and Regulations provide that a complaint may be amended at hearing upon motion to the administrative law judge.

The Supreme Court has long held that the Board should be given discretion in expanding the parameters of the initial charge in a matter. Specifically the Court noted in *NLRB v. Fant Milling Company*, 360 U.S. 301, 307 (1959): "A charge filed with the Labor Board is not measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." The Court went on to point out that once the Board's jurisdiction is invoked, it must be left free to make full inquiry under its broad investigatory power in order to properly discharge the duty of protecting public rights that Congress has imposed upon it. Under Section 102.17 of the Board's Rules and Regulations, complaint amendments may be permitted "upon such terms as may be deemed just." In the instant matter, Counsel for the General Counsel waited five months after the Board's Order and three months after my Order to move for the amendment to include a request for special remedies. General Counsel does not assert that any specific event occurred during this trial period of two months that triggered this arguably untimely amendment. While this motion to amend may lack basic courtesy to Respondent, it does not appear to violate Respondent's due process rights. The issue of whether Respondent altered its attendance records in anticipation of Board litigation has been fully litigated. There is nothing to indicate that Respondent would have defended its case any differently had General Counsel raised the issue of special remedies any earlier in this proceeding. Accordingly, I find that General Counsel's motion is adequately timely within the spirit of the Board's Rules and Regulations.

With respect to reimbursement for litigation expenses, the Board has articulated certain standards in determining the appropriateness of the requested reimbursement. In *Tiidee Products, Inc*., 194 NLRB 1234, 1236-1237 (1972), enfd. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. denied 421 U.S. 991 (1975), the Board found reimbursement to both the Board and the union for expenses incurred in the investigation, preparation, presentation, and conduct of cases necessary to discourage future frivolous litigation and to effectuate policies of the Act and to serve public interest. In its later decision in *Heck's Inc.,* 215 NLRB 765 (1974), the Board clarified that reimbursement of a charging party's litigation expenses will be ordered only where the defenses raised by the respondent are "frivolous" rather than "debatable." The Board explained that a respondent's defenses will be considered debatable if they turn on credibility, reasoning that parties should not be discouraged from seeking access to Board processes "where the credibility of witnesses leave an unfair labor practice issue in doubt." *Ibid* at 768. In a later decision in *Workroom for Designers*, 274 NLRB 840 (1985), the Board found flagrant violations of Section 8(a)(1) and (3) of the Act and yet found

that reimbursement of litigation costs was not warranted, relying in part on the fact that the merits of some allegations depended upon credibility. While the Board has found that the necessity for evaluating the credibility of witnesses would ordinarily render a defense debatable rather than frivolous, the Board has also departed from this standard in a case where the defense rested on "the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed." The Board further noted that the attorney, as the respondent's sole agent in bargaining, was in the unusual position of being able to determine from personal knowledge that the respondent's defense lacked credibility as well as merit. *Frontier Hotel & Casino,* 318 NLRB 857, 861 (1995), enfd. denied in relevant part 118 F.3d 795 (D.C. Cir. 1997). In finding the respondent's surface bargaining conduct to be flagrant, aggravated, persistent, and pervasive, the Board ordered the reimbursement of litigation costs of the charging parties as well as the General Counsel. In articulating its rationale, the Board opined that such a remedy was consistent with the Supreme Court's 1980 decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), wherein the Court acknowledged that "bad faith" warranting the reimbursement of attorneys fees "may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation."

Under the Board's existing precedent, the Board has primarily continued to provide a reimbursement remedy only in cases involving frivolous defenses and in cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. See *Cogburn Healthcare Center, Inc*., 335 NLRB 1397, 1402 (2001); *Waterbury Hotel Management*, 333 NLRB 482, fn. 4, (2001). In *Lake Holiday Manor*,[23] however, the Board awarded litigation costs and fees to the General Counsel, relying upon the "bad-faith" exception to the American rule found by the Supreme Court and discussed in *Frontier Hotel and Casino*, *supra* at 864. Specifically, the Board sustained the judge in awarding litigation costs and fees based the respondent's bad faith in the conduct of the litigation.

Citing two administrative law judge decisions[24] in its brief, Respondent argues that its conduct does not constitute bad faith justifying an award of fees and costs. Counsel for the General Counsel does not address the issue of debatable versus frivolous and simply relies upon the Board's holding in *Lake Holiday Manor* in asserting that the Board will grant litigation costs and attorneys' fees to the General Counsel when Respondent "exhibits bad faith in actions leading to the lawsuit or in the conduct of litigation."

The Board has continued to find a party's bad faith in litigation to warrant the award of litigation costs to General Counsel. *Teamsters Local Union NO. 122*, 334 NLRB 1190, 1194 (2001). In *Alwin Mfg. Co. Inc*., 326 NLRB 646, 647 (1998), the administrative law judge awarded litigation costs to the union and the General Counsel. In affirming the judge's decision, the Board explained that in doing so they were relying upon both Section 10(c) of the act and the Board's inherent authority to control Board proceedings through an application of the "bad-faith" exception to the American rule discussed in *Frontier Hotel &*

[23] 325 NLRB 469, 469 (1998).

[24] I note that the Board has affirmed one of the administrative law judge decisions cited by Respondent. In *Planned Building Services, Inc*., 330 NLRB 791, 793 (2000), the Board affirmed the judge in finding no merit to the Union's request for reimbursement of litigation expenses. The Board specifically found that the Employer had not raised frivolous defenses and had in fact actually prevailed on several issues.

Casino, *supra* at 864. In citing its earlier decision in *Frontier Hotel & Casino*, the Board noted that the Supreme Court[25] has sanctioned the award of attorneys' fees where a party exhibits bad faith in actions leading to the lawsuit or in the conduct of the litigation. At first blush, it might appear that the instant case involves the issue of whether Respondent has raised debatable or frivolous defenses. Certainly, because credibility is paramount in this case, it may be argued that Respondent's defenses are debatable and thus the award of litigation costs would not be appropriate under the Board's ruling in *Heck's Inc*. I do not find however, that such an analysis addresses the circumstances of this case. This case is reopened and continues in litigation because the General Counsel has presented credible evidence that Respondent knowingly altered its records in anticipation of litigation and in response to charges filed under the National Labor Relations Act. Accordingly, based upon my findings herein, Respondent has engaged in bad faith in the litigation of this case and an award of litigation costs to the General Counsel is appropriate.

D. Respondent's Motion to Strike General Counsel's Exhibits

During the course of this re-opened hearing, Counsel for the General Counsel offered into evidence a number of documents that were produced by Respondent in response to General Counsel's subpoena. Arledge identified a number of these documents as records that had been altered as a result of the review conducted by Scott and Arledge. Arledge identified other documents as simply documents reflecting Respondent's disparate enforcement of its attendance policy. During the course of the hearing, Respondent moved to strike all of General Counsel's exhibits that had not been specifically identified as allegedly improperly altered documents. Counsel for the General Counsel acknowledged that some of the documents submitted into evidence were submitted to provide an employee's full attendance record. At my request, Counsel for the General Counsel prepared a summary listing the specific relevance of each document submitted by General Counsel. The summary was provided to Respondent within 17 days after the close of hearing and 32 days before the briefs were submitted in this matter. Respondent asserts that General Counsel's summary reflects that many of General Counsel's submitted documents were apparently offered to show disparity in the enforcement of Respondent's attendance policy. Respondent contends that because the purpose of the reopened hearing was to determine whether the documents submitted during the 2003 hearing were improperly altered, documents concerning disparity are irrelevant.

Rule 402 of the Federal Rules of Evidence provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence. Under Rule 403 of the Federal Rules of Evidence all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the rules of evidence, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Respondent is correct that records that relate to the issue of altered documents are more persuasive and specifically relevant to this proceeding. Inasmuch as this case involves Respondent's attendance records for a specific time period in 2002, all of Respondent's attendance documents for the relevant time period are arguably relevant. Inasmuch as Respondent does not dispute the authenticity of these documents, I find the attendance records submitted by General Counsel relevant within the scope of the

[25] *Roadway Express v. Piper*, 447 U.S. 752, 766 (1980).

Federal Rules of Evidence and admissible in this proceeding. Respondent's motion to strike General Counsel's exhibits is denied.

Amended Conclusions of Law

1. Sunshine Piping, Inc., Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by its written warnings to Robert Huggins on August 26, 28, 30, 2002 as well as written warnings on September 13, and 16, 2002 and its suspension of Huggins on September 4, 2002.

4. Respondent violated Section 8(a)(1), (3), and (4) of the Act by terminating Robert Huggins on September 30, 2002.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in the other ways as alleged in the complaint.

Remedy

Having found that the Respondent has violated Sections 8(a)(1), (3), and (4) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondent rescind the discipline given to Robert Huggins on August 26, 28, and 30, 2002 and on September 4, 13, and 16, 2002. Having also found that Respondent discriminatorily discharged Robert Huggins, I shall recommend that Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also find that because Respondent altered its attendance records in anticipation of litigation and in responses to charges filed under the National Labor Relations Act, Respondent has engaged in bad faith in the litigation of this case. Accordingly, I find that such conduct warrants an order that Respondent reimburse the General Counsel for all litigation costs and attorneys' fees. Such costs and expenses to be determined at the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the

following recommended:[26]

ORDER

The Respondent, Sunshine Piping, Inc., Cedar Grove, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local 366 or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Robert Huggins full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make Robert Huggins whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines and discharge, and within 3 days thereafter notify Huggins in writing that this has been done and the disciplines and the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electric form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Cedar Grove, Florida facility copies of the attached notice marked Appendix.[27] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the

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[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order Of The National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) Pay to the General Counsel the costs and expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding, since June 30, 2003, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

Dated, Washington, D.C.

_____

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discipline, discharge or otherwise discriminate against any of you for supporting United Association of Journeymen & Apprentices of the plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366 or any other union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Huggins full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make Robert Huggins whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharge of Robert Huggins, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the disciple and discharge will not be used against him in any way.

WE WILL pay to the General Counsel the costs and expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding, since June 30, 2003, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

SUNSHINE PIPING, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610, New Orleans, LA 70112-3723
(504) 589-6361, Hours, 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.